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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BILLY J. FULTON	G045774
on Habeas Corpus.	(Super. Ct. No. 09CF2419)
	O P I N I O N

Original proceedings; petition for a writ of habeas corpus to challenge an order of the Superior Court of Orange County, Craig E. Robison, Judge. Petition granted.

Billy J. Fulton in pro per; Neil F. Auwater, under appointment by the Court of Appeal for Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Respondent.

* * *

The Sex Offender Registration Act (Pen. Code, § 290 et seq.; all statutory references are to this code unless otherwise stated) mandates a lifetime registration requirement for individuals convicted of qualifying sex offenses. Petitioner Billy J. Fulton filed a petition for a writ of habeas corpus seeking to vacate his 2009 convictions for violating the Sex Offender Registration Act. He correctly contends his 1989 court-martial convictions did not qualify under the act and he was not required to register as a sex offender. We grant the petition and order the superior court to vacate Fulton's conviction in case No. 09CF2419.

I

FACTUAL AND PROCEDURAL HISTORY

Pertinent to the issues presented in this case, Fulton was convicted of sodomy under article 125 of the Uniform Code of Military Justice (10 U.S.C.S. § 925) and two counts of violating article 134 of the Uniform Code of Military Justice (10 U.S.C.S. § 934) in a general court-martial in 1989. According to documentation from the Department of the Army, the article 134 convictions were for "indecent acts upon" the bodies of two males under 16 years of age, and the sodomy conviction involved a person under 16 years of age. In 2009, Fulton was charged in Orange County with four violations of the Sex Offender Registration Act. (§ 290 et seq.) He pled guilty to three counts of violating the Sex Offender Registration Act and admitted he suffered a prior "strike" conviction (§ 667, subds. (d), (e)(1))[1] and had served a prior term in prison (§ 667.5, subd. (b)).[2]

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[1] The complaint alleged one of his convictions in the military court qualified as a "strike" prior.

[2] After notifying the parties of our intention to do so, we take judicial notice of the felony complaint, the superior court's November 23, 2009 minute order, and the abstract of judgment in Orange County Superior Court case No. 09CF2419.

In May 2011, the California Department of Justice informed defendant "no registration requirement exists" for the offenses for which he had been convicted in the military court. The Department of Justice based its conclusion on the then recently published decision in *In re Rodden* (2010) 186 Cal.App.4th 24 [in determining whether conviction requires sex registration, court looks to the least adjudicated elements, not to the facts underlying the conviction].) Thereafter, Fulton started filing habeas corpus and *error coram nobis* petitions in the superior court, seeking to have his sex registration convictions vacated. Fulton alleged he was innocent of the registration offenses and that his counsel was ineffective for failing to investigate his military convictions. He asserted that had counsel investigated his military convictions, counsel would have discovered he was not required to register as a sex offender and none of the military convictions qualify as a "strike" prior under the "Three Strikes" law.

The superior court denied Fulton's petitions. Fulton then filed a petition for a writ of habeas corpus in this court and requested counsel be appointed. We ordered an informal response. After considering the informal response, we appointed counsel to represent Fulton and issued an order to show cause returnable before this court.

The petition, which was filed by Fulton in propria persona, the return, and the traverse filed by appointed counsel on Fulton's behalf do not contain many factual allegations. It appears, however, the parties are in basic agreement Fulton's military convictions were the only arguable basis for Fulton having an obligation to register as a sex offender.

II

DISCUSSION

The Sex Offender Registration Act (§ 290 et seq.) mandates a lifetime registration requirement for individuals convicted of a qualifying sex offense. (§ 290, subds. (b), (c).) The act applies to any person who, since July 1, 1944, has been convicted "in any court in this state or in any federal or military court of a violation of

Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, Section 243.4, paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses." (§ 290, subd. (c); see also former § 290.005, added by Stats. 2007, c. 579, § 13.)

An individual convicted of violating section 286, our sodomy statute, is required to register as a sex offender. (§ 290, subd. (c).) In California, sodomy is defined as any "sexual conduct consisting of contact between the penis of one person and the anus of another person." (§ 286, subd. (a).) Section 286 makes sodomy a crime in a number specific circumstances. Relevant to our discussion, section 286 makes it a felony for "any person over the age of 21 years [to] participate[] in an act of sodomy with another person who is under 16 years of age." (§ 286, subd. (b)(2).)

As noted above, Fulton was court-martialed in 1989, and was convicted under articles 125 and 134 of the Uniform Code of Military Justice. Article 125 describes the crime of sodomy as follows: "Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. . . ." (10 U.S.C.S. 925(a).)

In 2010, the court in *In re Rodden, supra*, 186 Cal.App.4th 24, was presented with the issue of what a court may consider in determining whether a defendant's out-of-state conviction qualified under the Sex Offender Registration Act as a conviction triggering a registration requirement. (*Id.* at p. 28.) Rodden asserted a court could not consider the facts underlying an out-of-state conviction and such a conviction triggers the duty to register as a sex offender only if the conviction's least adjudicated element would qualify under the act. (*Ibid.*) The Court of Appeal held an individual suffering an out-of-state conviction is required "to register as a sex offender in California only when the least adjudicated elements of the offense satisfy all the elements of a crime enumerated in subdivision (c) of section 290 or when the foreign jurisdiction required the defendant to register as a sex offender." (*Ibid.*) The least adjudicated elements of an offense are found in its statutory elements. (*People v. Robinson* (2011) 199 Cal.App.4th 707, 712.) Under the least adjudicated elements test, the court considers only the elements of the crime "'without regard to the facts of the particular violation.'" (*Ibid.*, quoting *People v. Thomas* (1988) 206 Cal.App.3d 689, 698.)[3] The decision in *Rodden* resulted in the Department of Justice sending Fulton a letter in state prison, where he was serving his sentence for failing to register as a sex offender, informing him he has no duty to register as a sex offender.

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[3] The least adjudicated elements test involves a presumption which, when it applies, holds that the offense committed in an out-of-state court "was for the least offense punishable under the foreign law." (*People v. Guerrero* (1988) 44 Cal.3d 343, 352.) In other words, if a foreign statute could be violated by conduct that would *not* violate the California statute, conviction of which would trigger the adverse consequence, the foreign conviction will not serve as a qualifying prior conviction. For example, if the triggering California offense requires a specific intent but the statute in the foreign jurisdiction does not, the presumption would be that the defendant did not have the specific intent required by the California statute at the time he or she violated the foreign statute resulting in the prior conviction. (See *People v. Warner* (2006) 39 Cal.4th 548, 557-558 [prior conviction for Nebraska offense that did not require specific intent did not qualify as prior conviction for a violation for section 288, subd. (a), which requires a specific intent].)

While section 286, subdivision (b)(2) punishes an individual over the age of 21 who engages in an act of sodomy with a person under the age of 16, the statute defendant was convicted of violating not only does not require the defendant to be over 21 years old, it does not even require a second person; the crime may be committed against an animal. (10 U.S.C.S. 925, subd. (a).) Comparing the elements of section 286 with the elements of the sodomy statute Fulton was convicted of violating, it is evident the federal statute does not meet the least adjudicated elements test. The federal sodomy conviction did not trigger a duty to register as a sex offender in California.[4]

Fulton's two convictions under article 134 of the Uniform Code of Military Justice do not qualify either. "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court." (10 U.S.C.S. § 934.) Article 134 is a catch-all penal statute and does not define any particular crime. Instead, it makes criminal "all conduct of a nature to bring discredit upon the armed forces." One need not commit any sexual offense to violate this provision. (See e.g., *Secretary of the Navy v. Avrech* (1974) 418 U.S. 676, 679 (dis. opn. of Douglas J.) [serviceman convicted under article 134 for attempting to publish statement critical of Vietnam War].)

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[4] An out-of-state conviction, including conviction by a military court, that does not meet the least adjudicated elements test will still require registration if the court in which the conviction occurred ordered the defendant register as a sex offender after finding at the time of conviction that the defendant "committed the offense as a result of sexual compulsion or for the purposes of sexual gratification." (§ 290.005, subd. (b).) There is no contention such an order was made by the military court in Fulton's case.

Respondent unconvincingly argues that although Fulton does not have a duty register as a sex offender because of rule announced in *In re Rodden*, *supra*, 186 Cal.App.4th 24 (least adjudicated elements test), Fulton was nonetheless required to register as a sex offender in 2009, before *Rodden* was decided. Respondent reasons that prior to the *Rodden* decision in 2010, Fulton had a duty to register because the Department of Justice imposed a registration duty whenever the facts underlying the conviction qualified as a registerable offense. No case is cited for the proposition that prior to a judicial decision expounding the law, the executive branch's contrary interpretation is the law. Moreover, as Fulton points out, the executive branch's interpretation of a law is not binding (see *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068-1069), for it is the judiciary that bears ultimate responsibility for the interpretation of laws enacted by the legislature. (*County of Sonoma v. State Bd. of Equalization* (1987) 195 Cal.App.3d 982, 990.)

Needless to say an interpretation by the executive will necessarily have ramifications on those to whom it is applied. That does not mean, however, the executive's interpretation has the same effect as an earlier court decision, such that a subsequent, contrary court decision can be said to have *changed* the law. *In re Rodden*, *supra*, 186 Cal.App.4th 24 did not change the law. (See *In re J.P.* (2009) 170 Cal.App.4th 1292, 1299 [court refused to consider facts underlying conviction and relied on offense for which J.P. was convicted].) Fulton was not required to register as a sex offender in 2009, the Department of Justice's contrary, erroneous interpretation notwithstanding.

Respondent's reliance on *In re Watford* (2010) 186 Cal.App.4th 684, is misplaced. In *Watford*, the defendant pled guilty to failure to register as a sex offender as required by his earlier conviction for a sex offense in Massachusetts. After his conviction in California, Watford returned to Massachusetts and withdrew his guilty plea to the earlier sex offense. He then returned to California and sought to vacate his conviction for

failure to register as a sex offender. The Court of Appeal denied relief because on the date of the California violation, Watford was required by law to register and failed to do so. (*Id.* at p. 687.) Fulton, on the other hand, was *not* required to register as a sex offender in 2009.

As the court in *Rodden* observed, "[I]t is undisputed that had petitioner known she could not be convicted, she would not have pled guilty. Such a guilty plea cannot stand. Our Supreme Court has stated that '[i]t would be unconscionable to hold a defendant bound by a plea made under such significant and excusable misapprehensions of the law.' [Citation.]" (*In re Rodden*, *supra*, 186 Cal.App.4th at p. 41.) Given the fact Fulton could not lawfully be convicted of failure to register as a sex offender because as a matter of law he was not required to register, justice requires the conviction be vacated.[5]

In apparent response to the decision in *Rodden*, the Legislature enacted emergency legislation amending section 290.005. (See Stats. 2011, ch. 362 (S.B. 622), § 2, p. 3843.) Subdivision (a) of section 290.005 presently provides: "Except as provided in subdivision (c) or (d), any person who, since July 1, 1944, has been, or is hereafter convicted in any other court, including any state, federal, or military court, of any offense that, if committed or attempted in this state, *based on the elements of the convicted offense or facts admitted by the person or found true by the trier of fact or stipulated facts in the record of military proceedings*, would have been punishable as one or more of the offenses described in subdivision (c) of Section 290, including offenses in which the person was a principal, as defined in Section 31." (Italics added.) Whether this section would now require Fulton to register as a sex offender based upon the same convictions is not properly before us. Defendant is not presently charged with failing to register as a sex offender and we will not issue an advisory opinion. (*Hunt v. Superior*

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[5] The result would not necessarily be the same if the guilty plea had been the result of a plea bargain wherein other charges, which presumably could have been proven, were dismissed in exchange for a guilty plea to a failure to register charge.

Court (1999) 21 Cal.4th 984, 998.) However, the 2011 amendment cannot, consistent with the advance notice component of due process, serve as a basis for requiring Fulton to register as a sex offender *in 2009*. (See *Bouie v. City of Columbia* (1964) 378 U.S. 347, 350-353 [defendant entitled to fair warning of what is required or prohibited].)

III

DISPOSITION

The petition for writ of habeas corpus is granted. The superior court is directed to vacate Fulton's conviction in case No. 09CF45774 and permit him to withdraw his guilty pleas.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.